

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

PAMELA BARBERIO,

Plaintiff,

v.

CITY OF BURIEN, LISA MARSHALL,  
WSBA NO. 24343, ATTORNEY CITY OF  
BURIEN, JIM BIBBY, CODE  
COMPLIANCE OFFICER, CITY OF  
BURIEN,

Defendants.

No. C05-1569P

DEFENDANTS' MOTION FOR  
DISMISSAL

**NOTED FOR: FRIDAY,  
JUNE 9, 2006**

COME NOW Defendants, City of Burien, Lisa Marshall and Jim Bibby, by and through their counsel of record, Kelly M. Wiley and Keating, Bucklin & McCormack, Inc., P.S., and request this Court dismiss Plaintiff's Complaint with prejudice.

**I. FACTS RELEVANT TO MOTION**

Plaintiff Pamela Barberio was prosecuted in King County District Court, Southwest Division, for the large amount of trash, including a junk vehicle, located on her property. *See Declaration of Kelly M. Wiley*, pp. 3-10. The trash on her property was in violation of the Burien Municipal Code and Ms. Barberio was afforded notice of these violations and an opportunity to resolve the issue. *Decl. of Wiley*, p. 11. On November 1, 2005, two months after Ms. Barberio filed this lawsuit, King County District Court Judge Eidee entered an

1 order finding that Pamela Barberio failed to comply with BMC 8.15 and 8.45 concerning  
 2 her property and Judge Eidee ordered that these violations constituted nuisances under  
 3 BMC 8.45.015 and 8.45.020(9)(a). *Decl. of Wiley*, pp. 12-15.

4 In the middle of this state proceeding, Ms. Barberio filed this lawsuit in federal  
 5 court. *See, generally*, court files.

6 Ms. Barberio failed to file a notice of removal in state court, but instead filed a  
 7 complaint. *Decl. of Wiley*, pp. 16-24. Although this Court alerted Ms. Barberio that her  
 8 removal had to comply “with the requirements of 28 U.S.C. § 1446(a)” Ms. Barberio has  
 9 failed to even attempt to comply with the requirements. *Decl. of Wiley*, p. 24. Instead, Ms.  
 10 Barberio has submitted numerous irrelevant documents including documents relating to a  
 11 previous criminal assault, and a letter from her neighbor expressing concern about Ms.  
 Barberio’s mental health. *Decl. of Wiley*, pp. 25-27.

12 Although Ms. Barberio makes numerous claims against these Defendants (*Decl. of*  
 13 *Wiley*, pp. 16-24), as the photos show, her case is simply about too much debris in her yard.  
 14 *Decl. of Wiley*, pp. 28-30.

15 Ms. Barberio is now asking the federal court to intervene in finalized state court  
 16 proceedings.

## 17 **II. ISSUES PRESENTED**

18 1. Where a state court defendant did not properly remove the underlying state  
 19 action should this Court remand the action back to state court or in the alternative dismiss  
 20 the action as it is completely without merit?

21 2. Where there is no evidence before this Court that all state court defendants  
 22 joined in the removal should the Court remand the removal action back to state court?

23 3. May a state court defendant remove a case to federal court when there the  
 24 state court plaintiff has not alleged any subject matter under federal law?

4. Even if a plaintiff properly removed the underlying state action does this  
 Court have jurisdiction where the underlying state court action implicate important state

interests and there is an adequate opportunity to raise any federal claims at the state court level?

5. Should this Court dismiss Plaintiff's Complaint because she cannot prove any elements of her claims?

6. Should this Court dismiss Plaintiff's Complaint as she has failed to file a Claim for Damages against the City of Burien as required by law?

7. Should this Court dismiss the claims against Lisa Marshall and Jim Bibby as Plaintiff's claims against these individuals are brought because of their official capacity?

8. Should this Court dismiss Plaintiff's claim against Lisa Marshall because of absolute prosecutorial immunity?

### III. EVIDENCE RELIED UPON

1. Declaration of Kelly M. Wiley in Support of Defendants Motion for Dismissal, and attached exhibits;

2. Declaration of Jan Roegner in Support of Defendants' Motion for Dismissal, and attached exhibit; and

3. All pleadings filed to date.

### IV. LEGAL AUTHORITY

#### A. Plaintiff Did Not Properly Remove This Matter.

On August 18, 2005 the City of Burien filed a complaint against Pamela and Adolf Barberio. *Decl. of Wiley*, pp. 3-10. On September 13, 2005 Ms. Barberio served a letter along with a complaint on Lisa Marshall, City Attorney for the City of Burien. *Decl. of Wiley*, pp. 16-24, p. 31. This letter and complaint were not filed with the Court until October 6, 2005. However, Ms. Barberio's purported removal does not comport with the removal statute. 28 U.S.C. § 1446 states that a defendant "desiring to removal any civil action . . . or criminal prosecution from a State court **shall file** in the District Court of the United States for the district and division within which such action is pending **and a notice of removal signed pursuant to Rule 11 of the Federal Rules Civil Procedure and**

1 containing a short and plain statement of the grounds for removal, together with a  
 2 copy of all process, pleadings and orders served upon such defendant or defendants in  
 3 the action.” 28 U.S.C. § 1446(a) (emphasis added). Here, Ms. Barberio did not file a  
 4 notice of removal in District Court, Ms. Barberio simply filed a complaint and sent a letter  
 5 to the City Attorney telling the City Attorney that she had “submitted a counter lawsuit  
 6 against the City of Burien, Ms. Lisa Marshall, and Jim Bibby.” *Decl. of Wiley*, p. 31. Nor  
 7 did Ms. Barberio file “all process, pleadings, and orders served upon (her) in the state  
 8 action” as required by 28 U.S.C. § 1446(a). Further, Ms. Barberio’s complaint, if can even  
 9 be considered a proper notice of removal, was filed more than 30 days after the City of  
 10 Burien instituted this action against Pamela and Adolf Barberio in State court in violation of  
 28 U.S.C. § 1446(b).

11 Further CR 101(b) indicates that the petitioner asking for removal “shall file along  
 12 with his notice of removal a copy of the complaint and shall within 10 days of filing his  
 13 notice of removal file with the clerk of this Court black-on-white copies of all additional  
 14 records and proceedings in the State court, together with his or his counsel’s verification  
 15 that they are true and complete copies of all the records and proceedings in the State court  
 16 proceeding.” Here, Plaintiff did not file a notice of removal in federal court nor did  
 17 Plaintiff verify that she filed a complete copy of the records and proceedings in the State  
 court action.

18 Also, the subject matter of the complaint alleged by Burien does not involve a  
 19 federal question, and as such cannot be removed to federal court. “For better or worse . . . a  
 20 defendant may not remove a case to federal court unless plaintiff’s complaint establishes  
 21 that the case ‘arises under’ federal law.” *Franchise Tax Board v. Const. Laborer’s*  
 22 *Vacation Trust*, 463 U.S. 1, 10 (1983). Further a federal claim cannot be based on a  
 23 counterclaim, cross-claim or third party claim. *Metro Ford Truck Sales*, 145 F.3d 320, 327.  
 24 Further, there is no diversity between the parties.

1           Additionally, there is no evidence before this Court that Adolfo Barberio joined in  
 2 the removal. The right to remove belongs to the defendants jointly; therefore, all  
 3 defendants who may properly join the removal must join; if any of them refuses the action  
 4 cannot be removed. *Hewitt v. City of Stanton*, 798 F.2d 1230, 1232 (9<sup>th</sup> Cir. 1986).

5           Ms. Barberio's failure to comply with the removal requirements and failure to have  
 6 Adolfo Barberio join in the removal action deems her removal improper and this Court does  
 7 not have jurisdiction.

8       **B. The Federal District Court Lacks Subject Matter Jurisdiction Over This Action.**

9           This Court does not have jurisdiction over this action. The federal court under  
 10 *Younger v. Harris*, 401 U.S. 37, 49-53, 91 S.Ct. 746, 27 L.Ed.2d 2269 (1971) found that the  
 11 federal court must abstain and allow state court to adjudicate all claims state and federal  
 12 (this is known as the "*Younger* abstention doctrine"). The policy objective behind *Younger*  
 13 abstention is to avoid unnecessary conflict between state and federal governments. *United*  
*States v. Morros*, 268 F.3d 695, 707 (9<sup>th</sup> Cir. 2001).

14          Federal courts must abstain where (1) state court proceedings are pending when  
 15 federal action is filed; (2) the proceedings implicate important state interest; and (3) there is  
 16 an adequate opportunity to raise a federal claim. *Dubinka v. Judges of the Superior Court*  
 17 *of the State of California for the County of Los Angeles*, 23 F.3d 218, 223 (9<sup>th</sup> Cir. 1994).  
 18 Once the law has been violated and a state prosecution is commenced, *Younger* requires  
 19 federal courts to abstain.

20       **1. Ongoing state judicial proceedings.**

21          *Younger* abstention is usually confined to federal actions seeking to enjoin state  
 22 court proceedings or seeking a declaratory judgment against operation of a state statute.  
 23 Allowing the federal action to proceed would "result in precisely the same interference with  
 24 and disruption of state proceedings that the long standing policy limiting injunctions  
 (against state court proceedings) was designed to avoid." *Green v. City of Tucson*, 255 F.3d

1 1095 (2001). State court proceedings are *presumed adequate* to raise the federal claim “in  
 2 the absence of unambiguous authority to the contrary.” *Pennzoil Co. v. Texaco, Inc.*, 481  
 3 U.S. 1, 15, 107 S. Ct. 1519, 95 L.Ed.2d 1 (1987).

4 Plaintiff is asking the Court to directly interfere with proceedings already decided in  
 5 a state court of limited jurisdiction (King County District Court). This is precisely the  
 6 situation the Supreme Court warned against in *Younger*. The federal court should not  
 7 intervene in this ongoing state court proceeding.

## 8 **2. Opportunity to raise federal questions.**

9 *Younger* requires that the federal plaintiff have a full and fair opportunity to litigate  
 10 his/her constitutional claim in the course of the state proceedings. *Ohio Civil Rights*  
 11 *Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 620, 627, 106 S.Ct. 2718  
 12 (1986) (emphasis added). The burden is on the party seeking relief in federal court to show  
 13 that it was barred from raising its federal claims in state court. *Lebbos v. Judges of*  
 14 *Superior Court*, 883 F.2d 810, 815 (9<sup>th</sup> Cir. 1989).

15 It has been suggested that federal courts are not always obliged to abstain where the  
 16 federal claimant has *no* practical opportunity to present her claims in state court because  
 17 state procedural rules *bar* presentation of the federal claim. *Dubinka*, 23 F.3d at 224. In  
 18 this case, however, Plaintiff is not barred from raising her claims in state court. *Younger*  
 19 abstention precludes federal intervention in a state judicial proceeding in which a losing  
 20 litigant **has not yet exhausted his state appellate remedies**. *Id.*, at 223 (citing *Huffman v.*  
 21 *Pursue, Ltd.*, 420 U.S. 592, 607-11, 95 S.Ct. 1200, 1209-12, 43 L.Ed.2d 482 (1975))  
 22 (emphasis added).

23 Plaintiff still has the opportunity to appeal any district court decision to the King  
 24 County Superior Court and Washington appellate courts. *See, RALJ 1.1; RAP 2.3(d)*. She  
 can continue to raise her legal arguments in those courts, and therefore has not exhausted  
 her opportunities to raise legal questions in state court.

1           **3.       No extraordinary circumstances exist warranting federal intervention.**

2           In rare cases, “extraordinary circumstances” may exist that make abstention  
3 inappropriate. *Younger*, 401 U.S. at 53-54. This exception requires that the state law  
4 involved be “*flagrantly and patently violative* of express constitutional prohibitions in every  
5 clause, sentence and paragraph and in whatever manner and against whomever an effort  
6 may be made to apply it.” *Younger*, 401 U.S. at 53-54 (emphasis added). This is a *very*  
7 *narrow* exception. It does not apply (i.e. abstention is still required) where a statute’s  
8 constitutionality is unclear or it is capable of being applied constitutionally in some cases.  
*Dubinka, supra*, 23 F.3d at 225.

9           **4.       Plaintiff has adequate remedies at law.**

10          The superior court reviews the decision of the District Court to determine whether  
11 that court has committed any *errors of law* (RALJ 9.1(a)), and the decision of the superior  
12 court is then subject to discretionary review by the Court of Appeals pursuant to RAP  
13 2.3(d). RALJ 9.1(h). Discretionary review of a superior court decision entered in a  
14 proceeding to review a decision of a court of limited jurisdiction will be accepted if a  
15 significant question of law under the Constitution of the State of Washington or of the  
16 United States is involved. RAP 2.3(d). Thus, regardless of the outcome of her civil case in  
17 King County District Court, Plaintiff has access to the state courts to challenge the  
constitutionality of the Burien statutes.

18          Statutes are “presumed to be constitutional, and the challenger bears a heavy burden  
19 to overcome that presumption.” *State Financial Commission v. O’Brien*, 105 Wn.2d 78,  
20 80, 711 P.2d 993 (1986). Any reasonable doubts are resolved in favor of constitutionality.  
*Washington Fed’n. of State Employees v. State*, 127 Wn.2d 544, 556, 901 P.2d 1028 (1995).

21          Further, even assuming the statute was found to be unconstitutional, Plaintiff’s  
22 claims against the City of Burien, its City Attorney and its Code Compliance Officer are  
23 completely meritless. Notwithstanding the fact that the municipal prosecutors are clearly  
24



entitled to prosecutorial immunity,<sup>1</sup> and Plaintiff has failed to state a basis for a claim whatsoever against the City and its employees could not be liable for merely enforcing state legislation later found to be unconstitutional. *See, e.g., R/L Associates v. Seattle*, 113 Wn.2d 402, 412, 780 P.2d 838 (1989).

**C. Ms. Barberio's Complaint Should Be Dismissed Because She Cannot Prove Any Elements Of Her Claims.**

"Summary judgment for defendant is appropriate when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celetix Corp. v. Cotrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed.2d. 265 (1986). The basis for Ms. Barberio's purported removal to federal court is stated in Ms. Barberio's complaint under "Complaint 1." *See Decl. of Wiley*, pp. 16-24. To briefly summarize Ms. Barberio's allegations in Complaint 1 she believes that a "fair and impartial hearing cannot be obtained" in State court based on a previous experience she had when she was "issued a citation for assault for and Ms. Barberio had many complaints about the way that case was handled. *Id.*, p. 18.

In Ms. Barberio's "Complaint 2" she asserts that "the current court documents that the plaintiff received" . . . depict [violation of code 28 U.S.C.: 1331] (sic), the Constitution of the United States of America, amendments to the U.S. Constitution, Declaration of Independence to include: exploration, extortion, malicious harassment, abusive in course of conduct, and misuse of authority." *Id.*, p. 19. Ms. Barberio does no present and indeed has no evidence which supports any of these claims. The basis for these claims are in her words "I found these documents on my back porch bound with a binder clip, left unprotected, open to the weather. I have no idea when they were delivered, or if they were removed from my property and examined by someone. They were not in a concealed envelope. The contents were out in the open in an unprotected area. I am questioning the 'proof of service.'" *Id.*, p. 19. Ms. Barberio's complaints should be dismissed with

<sup>1</sup> *See, Imber v. Pachtman*, 424 U.S. 411, 96 S. Ct. 984 (1976).



1 prejudice. Because Plaintiff's complaint is without merit if this Court is going to exercise  
 2 its jurisdiction it should simply dismiss Ms. Barberio's complaint with prejudice rather than  
 3 wasting judicial resources and remanding it to State court.

4 **D. Plaintiff's Suit Against The City Must Be Dismissed For Failure To File A**  
**Claim For Damages As Required By Law.**

5 The Washington legislature has set up a clear and specific requirement that any  
 6 person bringing suit against a "local government entity" must present and file a "claim for  
 7 damages" with the government entity in the time, in the manner and by the person  
 8 prescribed by statute. The requirement is mandatory and jurisdictional and is a condition  
 9 precedent to bringing suit against a city. Plaintiff failed to properly file a claim for  
 10 damages, and Plaintiff filed no claim at all. Based on her failure to fulfill the claim filing  
 11 requirements, Plaintiff's suit must be dismissed as a matter of law.

12 RCW 4.96.010 states:

13 All local governmental entities, whether acting in a governmental or  
 14 proprietary capacity, shall be liable for damages arising out of their tortious  
 15 conduct,... Filing a claim for damages within the time allowed by law shall  
 16 be **a condition precedent to the commencement of any action claiming**  
 17 **damages. The laws specifying the content for such claims shall be**  
 18 **liberally construed so that substantial compliance therewith will be**  
 19 **deemed satisfactory.**

20 RCW 4.96.020(2) provides:

21 **All claims for damages** against any such entity for damages shall be  
 22 presented to and filed with the governing body thereof within the applicable  
 23 period of limitations within which an action must be commenced.

24 In tandem, RCW 4.96.010 and RCW 4.96.020 require that individuals present and  
 file with the governing body – in this case the City of Burien – a claim for damages. Here,  
 it is uncontroverted Plaintiff never submitted any such claim to anyone at the City of Burien  
 at any time. *See, Declaration of Jan Roegner.*

The claim filing requirement is **jurisdictional**. The court has no authority to hear  
 any cause of action against a city where the claims filing requirement have not been met.

1 Ms. Barberio has no legal right to commence her action until she submitted a claim for  
 2 damages to the City of Burien and waited sixty days. However, Ms. Barberio has failed to  
 3 file any claim against the City of Burien. *See, Declaration of Jan Roegner.*

4 The failure to file the claim for damages is not insignificant, nor is it a mere  
 5 technicality. Washington courts have for the past seventy years strictly construed the  
 6 statutory requirements for filing a claim and waiting sixty days before initiating suit.  
 7 Washington courts repeatedly affirm summary dismissal of lawsuits where no claim is  
 8 filed. *Lewis v. Mercer Island*, 63 Wn. App. 29, (1991). The courts have also upheld  
 9 dismissal where a claim was filed, but the claimant failed to wait the requisite sixty days  
 10 before filing suit. *Kleyer v. Harborview Medical Center*, 76 Wn. App. 542 (1995). Finally,  
 11 in circumstances where the claim was filed improperly, summary judgment dismissal has  
 been affirmed. *Levy v. State*, 91 Wn. App. 934 (1998).

12 Washington case law emphasizes strict compliance with filing procedures. *Pirtle v.*  
 13 *District 81*, 83 Wn. App. 304, 309 (1996). While “substantial compliance” with laws  
 14 specifying the content of the claim is authorized, substantial compliance does not apply to  
 15 filing. *Id.* As noted above, it is well established that failure to comply with the filing  
 16 requirements leads to dismissal. Here, Ms. Barberio failed to file the required claim with  
 17 the City. This total failure to fulfill statutory requirements results in the Court’s lack of  
 18 jurisdiction to hear her damage claims sounding in negligence. Her action must be  
 dismissed as a matter of law.

19 **E. Plaintiff’s “Official Capacity Claims” are really claims against the City, and**  
 20 **therefore the individual Defendant employees should be release from this**  
 21 **lawsuit.**

22 Plaintiff has named the City Attorney and Code Compliance Officer Jim Bibby as  
 23 defendants in this action. These individually identified Defendants should be dismissed  
 24 because official-capacity suits are just “another way of pleading an action against an entity  
 of which an officer is an agent.” *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct.  
 3099, 87 L.Ed.2d 114 (1985). As long as the government entity receives notice and an

1 opportunity to respond, an official-capacity suit is to be treated as a suit against the entity.  
2 *Graham*, 473 U.S. at 166.

3 “[I]f the individuals are being sued in their official capacity as municipal officials  
4 and the municipal entity itself is also being sued, then the claims against the individuals are  
5 duplicative and should be dismissed.” *Vance v. County of Santa Clara*, 928 F. Supp. 993,  
6 996 (N.D. Cal. 1996); *see, also, Rosa R. v. Connelly*, 889 F.2d 435, 437 (2<sup>nd</sup> Cir. 1989);  
7 *Willis v. Bell*, 726 F. Supp. 1118, 1124 (N.D. Ill. 1989). Plaintiff is suing the City of Burien  
8 as well as these two City officials. There is no basis for pursuing this action against them  
9 other than to harass and intimidate them. In the event any of Plaintiff’s claims go forward,  
10 these individual Defendants should be released from this lawsuit and Plaintiff’s claims  
against them dismissed.

11 **F. Absolute prosecutorial immunity precludes Plaintiff’s claims against**  
12 **Defendant Marshall.**

13 Plaintiff has named Burien City Attorney Lisa Marshall as a defendant in this  
lawsuit based solely on her actions as the prosecutor for the City. *See, Pltf’s Complaint*.

14 Public prosecutors enjoy absolute judicial process immunity for the advocacy  
15 functions and for the decisions to initiate and move forward with judicial proceedings.  
16 *Babcock v. Tyler*, 884 F.2d 497, 501 (9<sup>th</sup> Cir. 1989). Prosecutorial immunity is absolute, in  
17 order to permit performance without fear of litigation. *Id.* Absolute immunity is imputed  
to the City. *Savage v. State*, 127 Wn.2d 434, 441, 899 P.2d 1270 (1995):

18  
19 Absolute immunity from liability under 42 U.S.C. § 1983 has been accorded  
20 state employees responsible for the prosecution of child neglect and  
21 delinquency petitions, the guardian ad litem serves as an advocate for the  
22 children in such proceedings, and psychologists and psychiatrists who  
provide information and findings for use in the proceedings by the State  
Department of Social Services. Such persons are accorded absolute  
immunity because participation in court proceedings is an integral part of the  
judicial process.

23 *Babcock*, 884 F.2d at 501-502.

Thus, another basis for dismissal exists as to the Plaintiff's claims against Lisa Marshall.

### V. CONCLUSION

Plaintiff's Complaint and her attempt to remove this action to federal court are deficient in many ways. The most notable deficiency is Plaintiff's inability to provide any admissible evidence which would support her far reaching and numerous claims against these Defendants. Instead, Plaintiff has submitted numerous irrelevant documents including documents relating to a previous criminal assault and a letter from her neighbor expressing concern about Ms. Barberio's mental health. As the photos attached depict and the underlying state court action reflect, this case is simply about too much debris in Ms. Barberio's yard. These Defendants respectfully request that Ms. Barberio's Complaint be dismissed with prejudice.

RESPECTFULLY submitted this 18<sup>th</sup> day of May, 2006.

KEATING, BUCKLIN & McCORMACK, INC., P.S.

s/Kelly M. Wiley

Kelly M. Wiley, WSBA # 24589

Attorney for Defendants

Keating Bucklin & McCormack, Inc., P.S.

800 Fifth Avenue, #4141

(206) 623-8861

(206) 223-9423 Facsimile

[kwiley@kbmlawyers.com](mailto:kwiley@kbmlawyers.com)

KEATING, BUCKLIN & McCORMACK, INC., P.S.

ATTORNEYS AT LAW  
800 FIFTH AVENUE, SUITE 4141  
SEATTLE, WASHINGTON 98104-3175  
PHONE: (206) 623-8861  
FAX: (206) 223-9423

DEFENDANTS' MOTION FOR DISMISSAL - 12

Cause No. C05-1569P

K:\KMW\wcia05195\p-051706-mottodismiss.doc

**DECLARATION OF SERVICE**

I hereby certify that on May 18, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

Pamela Barberio  
1521 S.W. 160<sup>th</sup> Street  
Burien, WA 98166

s/ Christine Jensen Linder  
Keating Bucklin & McCormack, Inc., P.S.  
800 Fifth Avenue, #4141  
(206) 623-8861  
(206) 223-9423 Facsimile  
[cjlinder@kbmlawyers.com](mailto:cjlinder@kbmlawyers.com)